



# United States Department of the Interior

## BUREAU OF LAND MANAGEMENT

Utah State Office  
440 West 200 South, Suite 500  
Salt Lake City, UT 84101  
<http://www.blm.gov/ut/st/en.html>



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April 10, 2013

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### DECISION

Rocky Mountain Wild	:	Protest to the Inclusion of Certain
c/o Mathew Sandler, Staff Attorney	:	Parcels in the February 20, 2007
1536 Wynkoop, Suite 303	:	Competitive Oil and Gas Lease Sale
Denver, Colorado 80202		

### Protest Denied

On January 5, 2007, the Bureau of Land Management (BLM) issued its Notice of Competitive Lease Sale (NCLS) thereby providing notice to the public that certain parcels of land would be offered in a competitive oil and gas lease sale scheduled for February 20, 2007.

In a letter received by the BLM on February 5, 2007, the Rocky Mountain Wild<sup>1</sup> (RMW) protested the following parcels: UT123, UT124, UT126, UT128B, UT134A, UT136, and UT015 through UT084.<sup>2</sup>

### Background

By errata issued on February 13, 2007, parcel UT134A was deferred. By decision issued on May 16, 2007, the protest associated with parcels UT123, UT124, UT126 and UT128B was denied. Lastly, by previous decision issued on June 30, 2010, the protest was granted in part and denied in part regarding parcels UT015 through UT084. The protest associated with these parcels has been addressed in these two decisions is not discussed further. This decision addresses parcel UT136 (lease UTU85447) located within the Moab Field Office.

Under the Federal Land Policy and Management Act (FLPMA) and its implementing regulations, BLM must manage the public lands under its jurisdiction in accordance with the applicable land use plan. At the time of the February 20, 2007 lease sale, certain stipulations and notices were attached to parcel UT136 in accordance with the existing Grand Resource Area Resource Management Plan (RMP). In October 2008, the Moab Field Office RMP was adopted. In addition to identifying what lands are available for oil and gas leasing and development, and the general leasing categories of such lands, the RMP set forth various stipulations that must be attached to all subsequently issued oil and gas leases. In December 2011, the successful bidder of parcel UT136 provided notice accepting the stipulations and notices as defined in the 2008 RMP.

<sup>1</sup> Formerly known as the Center for Native Ecosystems. RMW also filed its protest on behalf of Forest Guardians.

<sup>2</sup> RMW mislabels parcels UT124 as 124M, UT126 as 126M, and UT084 as 184.

## **Protest Contentions and BLM Responses**

Overall, RMW alleges that in offering the subject parcel for lease, the BLM has violated the National Environmental Policy Act (NEPA), the Clean Water Act (CWA), the Federal Land Policy and Management Act (FLPMA) and the National Historic Preservation Act (NHPA).

### **Decision**

For the reasons set forth below, I have determined that BLM complied with the requirements of NEPA, CWA, FLPMA and NHPA and other applicable Federal laws and regulations prior to the inclusion of parcel UT136 in the February 20, 2007 lease sale. Consequently, the RMW's protest is denied.

Protest Contention: Changes in the status of the white-tailed prairie dog have occurred and significant new information is available. BLM has ignored area of critical environmental concern (ACEC) nominations. RMW incorporates by reference their white-tailed prairie dog ACEC nominations and all the references they contain. Protest at IIA.1 & ii (pages 2-6).

BLM Response: In its Documentation of Land Use Plan Conformance and Determination of NEPA Adequacy (DNA) (item D.3, pages 3 and 4), the Moab Field Office specifically addresses the presence of new information relevant to areas of critical environmental concern (ACEC) and wildlife, including federally listed and Utah sensitive species. At page 3, BLM states that a review of the proposed action has been completed and is documented in the interdisciplinary team analysis record. Significant new information or a significant change in circumstances has not been identified by the BLM resource specialists. BLM describes and addresses new information as it relates to paleontology, ACEC's, VRM, cultural resources and Native American consultation, and wildlife.

Under 40CFR§1502.9(c)(1), a federal agency must supplement a NEPA analysis when "there are substantial changes in the proposed action ... or significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts. RMW refers to new scientific or significant information on sensitive species and leasing it has previously submitted but does not show how it applies any of it to parcel UT136. There is nothing in the RMW protest that establishes or shows that leasing and developing the protested parcel will affect the quality of the environment in a significant manner or to a significant extent not already considered. Consequently, under the applicable standards, the BLM has not overlooked significant new information. Furthermore, the question is not whether an area has undergone a significant change, but whether the proposed action will have a significant impact on the environment that has not been previously evaluated and considered.

Of concern here, the Cisco white-tailed prairie dog complex potential ACEC was discussed within the Moab DNA (item D.3, page 3). BLM utilized the Relevance and Importance Evaluations of ACEC Nominations (August 2004) and the Draft Programmatic T&E Species Biological Assessment documents in reaching its conclusion (DNA, item C, pages 1-2). BLM acknowledges that parcel UT136 occurs in this potential ACEC. BLM relies on the information and discussions regarding the relevant and importance (R&I) values in this August 2, 2004 determination. BLM determined that the lease notices developed to manage the white-tailed prairie dog were adequate and the new information provided was not significant. BLM maintains that the lease notice would assist the agency in conserving habitat. BLM continues and states that with the addition of the lease notice and the application of standard operating procedures, best management practices and the ability to move proposed surface disturbing activities pursuant to 43CFR§3101.1-2, the R&I values identified for this potential ACEC can be adequately protected

and consideration of the area for ACEC designation in the ongoing Moab plan revision would not be compromised. BLM notes here, as per the revised RMP, the Moab Field Office's Cisco Complex potential ACEC (RMP at page 31), is managed with a controlled surface use (CSU) stipulation for oil and gas leasing.

As RMW notes, BLM attaches to each parcel a stipulation addressing threatened and endangered species. In addition, BLM specifically attaches the following stipulations and notices to parcel UT136:

Stipulations\*

Threatened and Endangered Species  
Cultural Resources  
Air Quality  
CSU – White-Tailed Prairie Dog  
TL – Pronghorn Fawning  
CSU/TL – Burrowing Owl and Ferruginous Hawk  
CSU/TL – Golden Eagle Nesting Site and Territories  
CSU/TL – Bald Eagles

Notices

Pronghorn Fawning  
White-Tailed and Gunnison Prairie Dog  
Golden Eagle  
Raptors  
Utah Sensitive Species  
High Potential Paleontological Resources  
Mexican Spotted Owl

\*CSU = Controlled Surface Use and TL = Timing Limitation

During the leasing phase, applicable stipulations and notices are attached to the respective lease. Should BLM receive an actual application for permit to drill (APD), these stipulations and notices become conditionals of approval and are also subject to additional NEPA review. BLM retains full discretion and can enforce compliance with the terms and conditions of lease issuance. RMW has not shown that BLM's actions would cause the extinction of species. BLM specifically provides for the species identified in RMW's protest including the white-tailed prairie dog, burrowing owl and the Mexican spotted owl.

Protest Contention: BLM has ignored the state's guidance on leasing in white-tailed prairie dog habitat. By ignoring the states' recommendations in the White-Tailed Prairie Dog Conservation Assessment, the BLM is contributing to the need to list the species. Protest at IIA.1i (page 6).

BLM Response: BLM is unclear exactly which assessment the protester is referencing. BLM has reviewed the Utah Gunnison's Prairie Dog and White-Tailed Prairie Dog Conservation Plan<sup>3</sup> prepared by the Utah Division of Wildlife Resources (UDWR) (November 2007). As presented in this plan, RMW does identify which management objective, strategy or action step it claims is not being met or hindered by the BLM. A final report from the State of Utah is anticipated for release in June 2017.

As presented in RMW's protest to the BLM's November 2005 lease sale, RMW points to the results of a 2005 conservation assessment prepared by the multistate prairie dog conservation team. As per RMW, this assessment identified certain flaws within BLM's governing land use plans. BLM still retains authority under the Endangered Species Act stipulation as issued under Washington Office Instruction Memorandum 2002-174 to manage for threatened, endangered or candidate species. Should a species be listed by the USFWS, the BLM would be able to manage for that species utilizing this stipulation.

Protest Contention: BLM is poised to lease part of the Coyote Basin black footed ferret reintroduction area. Protest at IIA.2 (page 6).

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<sup>3</sup> Accessed online at: [http://wildlife.utah.gov/habitat/pdf/pd\\_plan.pdf](http://wildlife.utah.gov/habitat/pdf/pd_plan.pdf)

BLM Response: Parcel UT134 was deferred. Therefore, RMW's concerns regarding the black footed ferret are moot on this point.

Protest Contention: The Utah prairie dog may be uplisted to endangered status. RMW states that by introducing a major competing land use in Utah prairie dog habitat through the issuance of oil and gas leases, the BLM is demonstrating that threatened status is not enough to conserve this species. Protest at IIA.3 (page 6).

BLM Response: RMW's point regarding the possible upgrading of the Utah prairie dog (*Cynomys parvidens*) is also moot. As per its webpage, the United States Fish and Wildlife Service (USFWS) still identifies this species as threatened. Most recently, on June 21, 2011, USFWS issued its notice of revised 90 day petition finding in the Federal Register (pages 36053-36068). The USFWS found that the petitioners, including the RMW, did not present substantial information indicating that reclassifying the species from threatened to endangered was warranted and it did not initiate a status review in response to this February 3, 2003 petition. The actions and review procedures of the USFWS are outside the jurisdiction of the BLM. As it relates to parcels UT015 to UT084, BLM has previously addressed RMW's contentions in its June 30, 2010 decision.

Protest Contention: A new regional conservation plan constitutes significant new information that the BLM should fully consider before managing these lands for oil and gas extraction. Protest at IIA.4. (page 7).

BLM Response: RMW's protest regarding the Heart of the West Conservation Plan was previously addressed by BLM's decision issued on May 16, 2007.

Protest Contention: RMW expresses concern regarding oil and gas leasing and the potential for Coalbed Methane (CBM) development. RMW maintains that the parcels must be withdrawn because adequate NEPA analysis regarding the unique impacts of CBM development has not been conducted by the BLM. Protest at IIB (at pages 7-8).

BLM Response: As implied by RMW, BLM verified the parcel's (UT136) location against Map 3-3<sup>4</sup> (Coalbed Methane – Development Potential) prepared for the Moab Field Office Proposed RMP and Final EIS (August 2008). Parcel UT136 occurs outside any CBM development potential area.

Protest Contention: RMW maintains that NEPA prohibits interim actions that have adverse environmental impacts or limits the choice of reasonable alternatives. It continues and states that granting valid rights prejudices management prescriptions for nominated ACECs and otherwise undermines the RMP revision process. Protest at II C (pages 8-11).

BLM Response: Challenges to the BLM's land use planning process that resulted in the 2008 Moab Field Office Record of Decision and Approved Resource Management Plan (RMP) will not be considered here. RMW is referred back to the Director's Protest Resolution Report<sup>5</sup> prepared for the Moab RMP.

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<sup>4</sup> Accessed online at: [http://www.blm.gov/style/medialib/blm/ut/moab\\_fo/rmp/finaleis/maps\\_3-1\\_to\\_3-8.Par.61249.File.dat/Map-3\\_3\\_Coalbed\\_Methane.pdf](http://www.blm.gov/style/medialib/blm/ut/moab_fo/rmp/finaleis/maps_3-1_to_3-8.Par.61249.File.dat/Map-3_3_Coalbed_Methane.pdf).

<sup>5</sup> Accessed online at: [http://www.blm.gov/wo/st/en/prog/planning/planning\\_overview/protest\\_resolution/protestreports.html](http://www.blm.gov/wo/st/en/prog/planning/planning_overview/protest_resolution/protestreports.html)

Protest Contention: RMW believes that the BLM's determination that lease notices are sufficient is arbitrary and capricious. The record is completely devoid of any support for the agency's conclusions that assorted general CSU stipulations will effectively mitigate impacts on special status species from oil and gas development. Nor does it address how such measures will preserve ACEC values. The record itself establishes that BLM failed to analyze the proposed measures and their effectiveness as required under NEPA. The special stipulations do not provide BLM with the necessary authority to protect special status species. Nor do the lease notices satisfy USFWS' recommendations for stipulations. The BLM is only able to require changes to proposed projects if a species is listed under the ESA. Protest at IIE and F (pages 12-14).

BLM Response: The protestor wrongly concludes that the BLM lacks the necessary authority to protect special status species.

Special status species are addressed in the environmental impact statement (EIS, draft and final) prepared for the Grand Resource Area RMP (1985) as supplemented by environmental assessment (EA) UT-060-89-025 (1988) and the environmental analysis record (EAR, 1976). BLM explains in the DNA (items D.3, D.5 and D.6), new information that it considered since these documents were prepared. Possible mitigation measures are addressed in the EIS and EA. Site specific impacts of leasing is mitigated by the stipulations found on page A-20 through A-21 of this RMP. BLM concludes that because of the reasonably foreseeable level of oil and gas activity analyzed previously it still appropriate and additional connected, cumulative impacts are substantially unchanged from those presented in the RMP EIS and EA.

BLM worked closely with the USFWS in preparing for the lease sale. BLM also coordinated extensively with the UDWR. Both of these agencies who have jurisdiction by law and expertise, were involved with BLM's application of stipulations and notices. As shown in the DNA (page 4), a determination of "may affect, but not likely to adversely affect" the Mexican spotted owl, southwestern willow flycatcher and bald eagles (now delisted) was forwarded to the USFWS. On December 13, 2006, the USFWS concurred with the BLM's determination (DNA, page 6).

In compliance with existing law and policy, the BLM protects Threatened and Endangered (T&E) species from future oil and gas activity that might result from leasing by applying a T&E stipulation<sup>6</sup> to every lease parcel. Additionally, species-specific T&E lease notices are applied as needed. At the time of leasing, since there is no way of knowing if or where the impacts of development would potentially occur, the lease stipulation identifies BLM's authority for preventing impacts to listed species. Species-specific lease notices identify the parcels where species or habitat (existing or potential) may exist and the conservation measures that may be used to protect the species or habitat should they be affected by future development. Although Section 7 of the ESA applies to future lease development as a matter of law, the stipulation and notice provides full disclosure to potential lessees that specific T&E species, habitat or potential habitat exist on a respective parcel. If future development is proposed and conservation measures outlined in the lease notice are applied, the scope of Section 7 consultation could be minimized at the development stage. However, if these measures are found to be inadequate, the BLM retains authority to deny the proposal.

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<sup>6</sup> Instruction Memorandum WO- 2002-174 provides national direction for the use of this stipulation.

Protest Contention: BLM's use of the Determination of NEPA Adequacy [DNA] was insufficient. RMW states that BLM is required to supplement an EIS when new information or circumstances arise. Protest at IIG (pages 14-16).

BLM Response: As per Departmental Manual (516 DM 11.6), an existing environmental analysis document may be relied upon in its entirety and new NEPA analysis will not be necessary (NEPA Handbook-1790-1, page 22). The associated NEPA documents were reviewed and it was determined by the Moab Field Office (resource specialists and management) that their analysis adequately addressed the specific effects of the lease sale. The DNA was also utilized to determine if new circumstances or information were available or applicable to the proposed action. Based on their review, Moab field office personnel determined that the existing analysis sufficiently assessed the environmental consequences of leasing and adequately covered parcel UT136.

As RMW identifies, BLM did address their ACEC nomination and purported new information in a land use planning process within an EIS that concluded in 2008. As previously stated, the USFWS also found that the petitioners, including the RMW, did not present substantial information that would warrant a change in the Utah prairie dog's listing.

Protest Contention: BLM should not lease these parcels because NEPA requires BLM to analyze the impacts of oil and gas development before lease issuance. RMW asserts that BLM is deferring environmental review without retaining the authority to preclude surface disturbance. RMW maintains that NEPA requires the BLM to consider no surface occupancy and no-leasing alternatives prior to leasing. BLM must comply with the CWA standards prior to leasing lands for oil and gas development. BLM has discretion not to lease the challenged parcel. Protest at IIG1-3&K (pages 16-20).

BLM Response: BLM's procedures for managing oil and gas leasing and development activities are well established through land use planning, parcel nomination, competitive leasing, well permitting, development, operations, production, plugging and reclamation. Should a complete application for permit to drill (APD) be received, the BLM will again initiate the NEPA process based on the details contained within that APD. The pre-leasing analysis claims that RMW makes cannot be addressed at the leasing stage. Determining the potential impacts of development cannot proceed until the details of an APD are known.

As documented in the DNA (item D.2, pages 2-3), BLM considered a range of alternatives from full production to no action in the EIS prepared for the Grand Resource Area RMP. Alternative C (limited protection) was selected. BLM addressed a no leasing alternative in the EAR (1976).

RMW has not provided adequate evidence that would support a BLM decision to withdraw parcel UT136 from further consideration, nor has it detailed how state identified beneficial uses of water would be affected on parcel UT136.

Protest Contention: BLM's obligation to prevent unnecessary or undue degradation (UUD) under FLPMA is not discretionary. BLM must demonstrate that leasing will not result in future mineral development that causes UUD by irreparably damaging the CWP [Citizen Wilderness Proposed] lands. Existing analysis has not satisfied the BLM's obligation to comply with the UUD standard and prevent permanent impairment of the wilderness qualities of these public lands. Protest at II.I (page 20).

BLM Response: Parcel UT136 does not occur within any of the wilderness re-inventory areas; therefore, the protest is moot on this point.

RMW correctly recognizes that FLPMA requires BLM to prevent unnecessary or undue degradation in its management of the federal public lands. However, RMW's contention that BLM has violated FLPMA relies entirely on its unsupported assumption that the sale parcel UT136 will cause unnecessary or undue degradation to the lands underlying this parcel. Nothing in the NEPA analyses BLM relied on in determining which parcels to include in the sale in any way supports this assumption, and the RMW protest provides no evidence to show otherwise. The mere issuance of leases does not constitute unnecessary or undue degradation of the public lands. Further, for one to show that oil and gas development would have this detrimental effect, one must at a minimum show that a lessee's operations would be conducted in a manner that does not comply with applicable law or regulations, prudent management and practice, or reasonably available technology. RMW's mere assertion that leasing of the protested parcels will cause unnecessary or undue degradation is groundless.

Protest Contention: Leasing would violate the NHPA. RMW states that the "lease notice" does not indicate that either the BLM [or Forest Service]:

- 1) made the requisite reasonable and good faith effort to identify historic properties in the vast majority of the areas covered by these leases as required by 36 CFR§800.4(b);
- 2) determined whether identified properties are eligible for listing on the National Register based on criteria in 36 CFR§60.4;
- 3) assessed the effects of the proposed oil and gas leasing on any eligible historic properties found, as required under 36CFR§800.4, 800.5, 800.9(a);
- 4) determined whether those effects would be adverse as required by 36 CFR§ 800.5, 800.9(b); or
- 5) have avoided or mitigated any adverse effects, 36 CFR§800.8(e), 800.9.

RMW continues and states that the BLM did not consult with either the public or Native American tribes regarding the potential effects that oil and gas leasing and associated exploration and development could have on cultural resources that have been located to date. Absent this identification and consultation, offering the proposed lease[s] violates the NHPA. Protest at II.K. (pages 21-22).

BLM Response: In compliance with the provisions of the State Protocol Agreement between BLM and the State Historic Preservation Office (SHPO), BLM documented a "no historic properties affected, eligible sites present but not affected" determination as defined by 36CFR§800.4. The SHPO concurred with this determination on December 11, 2006.

The Moab Field Office did prepare a cultural records review which summarized the archaeological inventories and cultural sites located within the area of potential effect, including parcel UT136. In preparing the corresponding DNA, BLM consulted with 10 tribes. This information and coordination was utilized in concluding the Section 106 process.

BLM made a reasoned and good faith effort to inventory historic properties within the identified areas of potential effect [36 CFR 800.4(b)1]. A 100% intensive pedestrian inventory is not required for Section 106 compliance as explained in 36 CFR 800.4. The BLM has explored the sources of information and undertaken the "level of effort" necessary to identify historic properties for this particular undertaking as outlined in the applicable regulations. In all cases, BLM documents a Class I literature review remains consistent with the Programmatic Agreement (PA) and is sufficient for the leasing process. In addition, BLM maintains that cultural surveys would be conducted at the APD stage which would effectively initiate an additional NHPA requirement at that time.

As demonstrated by RMW's protest, members of the public had the opportunity to raise concerns to the BLM regarding parcels proposed for inclusion in the sale and the opportunity to protest such inclusion. Although RMW now argues that the BLM failed to adequately consult with members of the public or questions BLM's use of the DNA process, RMW has not informed the BLM what degree of public participation it believes is required under the NHPA or the PA, or provided any legal authority for its assertions. Moreover, RMW's protest does not demonstrate that the BLM's Section 106 consultation has overlooked a potentially eligible property located within parcel UT136.

Overall, RMW does not specify with facts or information to show how its allegations applies to parcel UT136. It is well established that the BLM properly dismisses a protest where the protestant makes only conclusory or vague allegations or the protestant's allegations are unsupported by facts in the record or competent evidence. RMW incorporates by reference previous protests, ACEC nominations and USFWS petitions for listing. BLM is under no obligation to sort through a protestant's list of alleged errors and attempt to discern which alleged errors the protestant intended to invoke for a particular parcel. Such an unduly burdensome and inefficient process would unreasonably divert the time and resources that the BLM otherwise needs to manage the public lands as mandated by Congress.

For the BLM to have a reasonable basis to consider future protests, RMW must identify the specific ground for protest and explain how it applies to each protested parcel. Any allegations of error based on fact must be supported by competent evidence. Further, RMW must consider whether any lease stipulations or notices that apply to a particular parcel may be relevant to its allegations, and explain how such stipulations or notices do not obviate the allegations. Failure to comply with any of the foregoing may result in the summary dismissal of the protest.

### **Conclusion**

As the party challenging the BLM's offering of parcel UT136 (lease UTU85447) for leasing, RMW bears the burden of establishing that the BLM's action was premised on a clear error of law, error of material fact, or failure to consider a substantial environmental question of material significance. RMW has not met this burden. To the extent that RMW has raised any allegations not discussed, they have been considered and are found to be without merit. For these reasons, and for those previously discussed, the RMW protest regarding parcel UT136 (lease UTU85447) is hereby denied. The BLM has received an offer on this parcel and will issue a lease to the successful bidder after issuing this and any other relevant decision.

This decision may be appealed to the Interior Board of Land Appeals, Office of the Secretary, in accordance with the regulations contained in 43 C.F.R. Part 4 and instructions contained in Form 1842-1 (Enclosure 1). If an appeal is taken, the notice of appeal must be filed in this office (at the address shown on the enclosed Form) within 30 days from receipt of this decision. The appellant has the burden of showing that the decision appealed from is in error.

If you wish to file a petition for a stay pursuant to 43 C.F.R. Part 4, Subpart B § 4.21, during the time that your appeal is being reviewed by the Board, the petition must show sufficient justification based on the standards listed below. If you request a stay, you have the burden of proof to demonstrate that a stay should be granted.



### Standards for Obtaining a Stay

Except as otherwise provided by law or other pertinent regulations, a petition for a stay of a decision pending appeal shall be evaluated based on the following standards:

1. The relative harm to the parties if the stay is granted or denied;
2. The likelihood of the appellant's success on the merits;
3. The likelihood of immediate and irreparable harm if the stay is not granted; and
4. Whether the public interest favors granting the stay.

Copies of the notice of appeal, petition for stay, and statement of reasons also must be submitted to the Office of the Regional Solicitor, Intermountain Region, 125 South State Street, Suite 6201, Salt Lake City, Utah 84138, at the same time the original documents are filed in this office. You will find attached the name and address of the party who purchased parcel UT136 (lease UTU85447) at the February 2007 lease sale and who therefore must be served with a copy of any notice of appeal, petition for stay, and statement of reasons (Enclosure 2).

/s/ Juan Palma

Juan Palma  
State Director

#### Enclosures

1. Form 1842-1
2. Purchaser

cc: James Karkut, Office of the Solicitor, Intermountain Region,  
125 South State Street, Suite 6201, Salt Lake City, UT 84138

bcc: Lease Sale Book Feb07  
Reading File UT-920  
Central Files UT-950

UT9221 pschuller:CNE Protest Response 0207 3-1-13

Enclosure 1  
Form 1842-1

Enclosure 2

Purchaser

Parcel (Lease Number)  
UT136 (UTU85447)

Purchaser  
Retamco Operating Inc.  
c/o Joe Glennon, Vice President  
One S. Broadway Avenue  
Red Lodge, MT 59068